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## COMMENT

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### THE APPLICABILITY OF STATE APPEAL BOND CAPS IN SUITS BROUGHT IN FEDERAL COURTS PURSUANT TO DIVERSITY JURISDICTION

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## INTRODUCTION

Since 2000, forty-one states have passed appeal bond reform statutes, a tort reform measure that, in some shape or form, caps the amount of a supersedeas bond a defendant must secure in order to stay the execution of a judgment while pursuing an appeal.<sup>1</sup> The state statutes vary widely in their operation, but their underlying goal is to protect a defendant’s right to appeal massive damages awards without putting himself in dire financial straits just to secure a sufficient supersedeas bond.<sup>2</sup> Prior to the wave of reform beginning in 2000, state courts often required a bond in the amount of the full judgment plus costs and interest, which could be prohibitively

<sup>1</sup> The terms “supersedeas bond” and “appeal bond” are often confused. A supersedeas bond is what a defendant must obtain to secure the judgment and prevent the plaintiff from collecting the judgment while the case is on appeal. *See* FED. R. CIV. P. 62(d). In contrast, an appeal bond secures the appellant’s costs on appeal. *See* FED. R. APP. P. 7; *see also* Doug Rendleman, *A Cap on the Defendant’s Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1096 n.25 (2006) (noting that, although professional usage during the tort reform debates has combined the terms “supersedeas bond” and “appeal bond,” the two have different technical meanings). Because the movement to reform state supersedeas bond statutes has largely used the term “appeal bond” instead of “supersedeas bond,” scholars use the terms interchangeably, as does this Comment. *See id.*

<sup>2</sup> *Cf.* MONT. CODE ANN. § 25-12-103 (2013) (instituting an appeal bond cap “in order to ensure that financial considerations do not adversely impact the right of appeal”). *But see* Rendleman, *supra* note 1, at 1143-49 (arguing that appeal bond caps support a defendant’s right to appeal, but noting that this argument was not thoroughly discussed in many state legislatures passing the early appeal bond reform statutes).

expensive if the verdict was for hundreds of millions—or billions—of dollars.<sup>3</sup> This Comment addresses whether state statutes capping supersedeas bond amounts are applicable in federal courts exercising diversity jurisdiction, or whether such statutes conflict with Federal Rule of Civil Procedure (FRCP) 62(d)—the rule governing postjudgment stays pursuant to supersedeas bonds.

Section I.A begins with a discussion of the origins and evolution of supersedeas practice in the federal courts. Section I.B continues with an explanation of why tort reformers pushed for appeal bond reform and describes the approaches that various states currently take toward supersedeas practice. Part II provides a brief summary of the evolution of the *Erie*<sup>4</sup> doctrine. Finally, Part III evaluates the applicability of state appeal bond reform statutes in federal courts exercising diversity jurisdiction, in light of the Court's *Erie* jurisprudence. This Comment concludes that federal courts should interpret Rule 62(d) as not entirely covering the issue of how much a defendant must secure by supersedeas bond in order to stay execution of a judgment during appeal. Rather, federal courts should go on to apply *Erie* and its progeny in deciding this issue. Under a traditional *Erie* analysis, however, the applicability of appeal bond reform statutes is not likely to be deemed outcome-determinative. Yet, if a court were to accept the argument that the applicability of appeal bond caps is an outcome-determinative decision because such caps sufficiently alter the settlement landscape, then balancing the state's interest in capping appeal bonds with the federal interest in applying Rule 62(d) leads to the conclusion that federal courts sitting in diversity should apply the state statutes capping appeal bonds.

## I. OVERVIEW OF SUPERSEDEAS BONDS IN FEDERAL AND STATE COURTS

When a defendant in a civil suit is held liable for monetary damages following an adverse judgment, he has several options for obtaining review of the verdict. A defendant may, for example, seek a new trial or review of the judgment in the trial court,<sup>5</sup> or he may seek appellate review if his postverdict motions prove unsuccessful.<sup>6</sup> This Comment focuses on the circumstances

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<sup>3</sup> See *infra* notes 29-35 and accompanying text.

<sup>4</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>5</sup> FED. R. CIV. P. 59(a), (e).

<sup>6</sup> See 28 U.S.C. § 1291 (2006) (granting the United States Courts of Appeal jurisdiction to hear appeals from final decisions of the United States District Courts).

surrounding an *appeal* of an adverse judgment. When a defendant seeks to avail himself of the appellate process to review the verdict and damages award, the parties are confronted with a problem: the judgment debtor (the losing defendant) does not want to pay the award before the appellate review process is complete, while the judgment creditor (the winning plaintiff) wants to collect the judgment without delay. The procedural solution to this conflict of interest has been to stay execution of the judgment, usually conditioned on the judgment debtor posting a supersedeas bond or otherwise securing the judgment until the final disposition of the defendant's appeal.<sup>7</sup> The supersedeas bond serves to "preserve the status quo while protecting the non-appealing party's rights pending appeal."<sup>8</sup> The supersedeas bond maintains the status quo by allowing the defendant to stay enforcement of the judgment, thereby allowing the defendant to avoid the risk of having to pursue the plaintiff and seek restitution if the appeal is successful, while simultaneously securing the monetary award for the plaintiff in the event the appeal is unsuccessful.<sup>9</sup>

#### A. *Staying a Judgment on Appeal in Federal Court*

In the federal courts, FRCP 62 governs the stay of proceedings to enforce a judgment. While Rule 62(a) generally affords judgment debtors an automatic fourteen-day stay after entry of an adverse judgment and Rule 62(b) gives the trial judge the discretion to stay any enforcement proceeding pending the disposition of certain postverdict motions, it is Rules 62(d) and Rule 62(f) that govern stays during the pendency of an appeal. Rules 62(d) and 62(f) are the two primary alternatives the Federal Rules provide for the

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<sup>7</sup> See Rendleman, *supra* note 1, at 1094, 1097 (discussing the competing goals that appeal bonds serve—they help preserve the defendant's right to appeal while assuring the plaintiff that payment is available and that the appeal was not entirely frivolous, since the defendant must pay a bond premium); see also FED. R. CIV. P. 62(d), (f) (providing that an appellant can obtain a stay either by posting a supersedeas bond or without posting a bond whenever a stay would be available according to state law and provided that Rule 62(f)'s other requirements are met); Acevedo-García v. Vera-Monroig, 296 F.3d 13, 17 (1st Cir. 2002) (describing the two ways in which stays are ordinarily sought—that is, under Rule 62(d) or 62(f)); Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n, 636 F.2d 755, 757-58 (D.C. Cir. 1980) (finding that a district court may, in its sound discretion, authorize unsecured or undersecured stays in appropriate cases, such as where an appellant provides assurances or other adequate security).

<sup>8</sup> Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1190-91 (5th Cir. 1979).

<sup>9</sup> See Rendleman, *supra* note 1, at 1098-99 (explaining that appeal bonds are attractive because a plaintiff can collect directly from the appeal bond should the judgment be affirmed while a defendant would not have to give up valuable assets and subsequently sue for restitution should the appellate court reverse); Poplar Grove, 600 F.2d at 1191 (same).

stay of monetary judgments pending appeal.<sup>10</sup> Rule 62(f) provides that “[i]f a judgment is a lien on the judgment debtor’s property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.”<sup>11</sup> If a judgment debtor is able to meet the requirements of 62(f), including the conditions required by state law for a stay of execution, the district court must grant the stay.<sup>12</sup> Alternatively, Rule 62(d), the primary focus of this Comment, automatically stays a monetary judgment once the judgment debtor posts an appropriate supersedeas bond.<sup>13</sup> However, it is important to note that a defendant’s appeal is not dependent upon obtaining a supersedeas bond. A defendant can always appeal a verdict from the district court without meeting any of Rule 62’s requirements. In that scenario, the judgment creditor can move to collect the judgment as soon as the fourteen-day automatic stay has elapsed.<sup>14</sup>

### 1. Brief History of Supersedeas Practice in the Federal Courts

The federal court system has incorporated supersedeas practice since the Judiciary Act of 1789.<sup>15</sup> Before the adoption of the Federal Rules of Civil Procedure in 1938, the rules and procedures for obtaining a stay upon appeal were codified by statute.<sup>16</sup> Present-day Rules 62(d) and 62(f) are substantively the same as the versions contained in the original 1938 edition of the Rules. Rule 62, however, does not “precisely define the amount and conditions of a supersedeas bond.”<sup>17</sup> The original version of the

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<sup>10</sup> *E.g., Acevedo-García*, 296 F.3d at 17.

<sup>11</sup> FED. R. CIV. P. 62(f).

<sup>12</sup> *Acevedo-García*, 296 F.3d at 17.

<sup>13</sup> *Id.*; *see also* FED. R. CIV. P. 62(d) (“If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . .”).

<sup>14</sup> *See Acevedo-García*, 296 F.3d at 17 (pointing out that plaintiffs are free to seek execution of their judgments if a stay has not been granted on any ground).

<sup>15</sup> *See* Act of Sept. 24, 1789, § 23, 1 Stat. 73, 85; *see also* *Hovey v. McDonald*, 109 U.S. 150, 159 (1883) (“To remedy the inconveniences that arose from an immediate issue of execution before the appellate proceedings could be perfected, the original judiciary act of 1789 provided . . . that no execution shall issue upon judgments in the courts of the United States, where a writ of error may be a supersedeas, until the expiration of ten days after the judgment.”); *In re* Fed. Facilities Realty Trust, 227 F.2d 651, 654 (7th Cir. 1955) (explaining that supersedeas practice “is a creature of statutory origin,” which existed “[f]rom the inception of the federal judiciary”).

<sup>16</sup> *See* 28 U.S.C. § 841 (1934) (repealed 1948) (providing a stay of execution where judgments are liens on the property of a defendant, which was later adopted by Rule 62(f)); 28 U.S.C. § 874 (1934) (repealed 1948) (allowing the defendant to obtain a supersedeas bond to stay enforcement of a judgment pending appeal, which was later adopted by Rule 62(d)).

<sup>17</sup> *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979).

Rules filled this gap with Rule 73(d), which, in relevant part, directed that when a defendant obtained a supersedeas bond to stay the enforcement of a monetary judgment

the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment . . . , costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.<sup>18</sup>

When the Federal Rules of Appellate Procedure (FRAP) became effective in 1968, FRAP 8 abrogated and supplanted FRCP 73.<sup>19</sup> However, the rulemakers neither amended FRCP 62 to include the substance of former FRCP 73(d) nor wrote FRAP 8 to contain the detail of the rule it supplanted.<sup>20</sup> Without FRCP 73(d) directing courts regarding the sufficiency of a supersedeas bond, the federal courts were left to decide the amount a defendant had to secure via supersedeas bond in order to receive a stay under FRCP 62(d).

## 2. Current Approach to Supersedeas Practice in the Federal Courts

After the Federal Rules of Appellate Procedure supplanted former FRCP 73, the federal courts first had to decide whether posting a supersedeas bond would be a procedural requirement for obtaining a stay pursuant to FRCP 62(d). Former Rule 73(d) had explicitly provided for a stay by "security other than the bond" if a defendant could show good cause,<sup>21</sup> but Rule 62(d) simply states that the "appellant may obtain a stay by supersedeas bond."<sup>22</sup> While some courts viewed the supersedeas bond as a necessary condition for obtaining a stay under Rule 62(d),<sup>23</sup> most courts took the position that Rule 62(d) provided a stay as a matter of right if a defendant posted a supersedeas bond but retained the discretion to allow for unsecured stays or stays secured by alternative means.<sup>24</sup>

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<sup>18</sup> FED. R. CIV. P. 73(d), 383 U.S. 1061-62 (1966) (abrogated and supplanted 1968).

<sup>19</sup> *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 758-59 (D.C. Cir. 1980).

<sup>20</sup> *Id.*

<sup>21</sup> FED. R. CIV. P. 73(d), 383 U.S. 1062 (1966) (abrogated and supplanted 1968).

<sup>22</sup> FED. R. CIV. P. 62(d).

<sup>23</sup> *See Fed. Prescription Serv.*, 636 F.2d at 757 n.3 (citing cases holding that a supersedeas bond is required to grant a stay under the Federal Rules of Civil Procedure).

<sup>24</sup> *See id.* at 757-58 (rejecting the view that a supersedeas bond is required to stay collection of a judgment on appeal and holding that the district court has discretion to accept less secure means); *see also Hurley v. Atl. City Police Dep't*, 944 F. Supp. 371, 374 (D.N.J. 1996) (citing numerous circuit court decisions holding that district courts have the discretion to allow unsecured stays).

Next, the federal courts needed to determine the amount of the judgment a defendant would have to secure by supersedeas bond when pursuing a stay as a matter of right under Rule 62(d). Again, the prevailing view in the federal courts has been to follow the directive contained in former Rule 73(d) and to require a supersedeas bond in the amount of the full judgment plus costs and interest while giving the district courts discretion to set the bond at a lower amount if an appellant shows good cause.<sup>25</sup> Many jurisdictions across the nation have explicitly provided for this method of calculating the amount of a supersedeas bond in their local court rules.<sup>26</sup>

Judges have considered various factors when faced with a judgment debtor's motion to either forego the supersedeas bond requirement in its entirety, reduce the amount required for the supersedeas bond, or allow an alternative form of security to obtain a stay. These factors include the following: (1) the defendant's financial position and a bond's threat to the defendant's solvency; (2) the confidence the district court has in the defendant's ability to pay the judgment; (3) the extent to which posting the bond would be impracticable or impossible; (4) the harm to the defendant if a stay were not granted; (5) the availability of alternative security arrangements that could protect the appellee; (6) the anticipated length of the appeal process; (7) the ability of the defendant to remain solvent throughout the appeal; and (8) the merits of the defendant's appeal.<sup>27</sup> Nevertheless, some federal courts have refused to depart from their standard requirement of demanding a supersedeas bond in the amount of the entire judgment, even in the face of a defendant's insolvency.<sup>28</sup> These courts have generally

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<sup>25</sup> See *Strong v. Laubach*, 443 F.3d 1297, 1299 (10th Cir. 2006) (recognizing that district courts have the discretion to set the amount of the supersedeas bond lower than the full amount of the judgment); *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154-55 (2d Cir. 1986) (looking to "equitable principles" to determine the adequate security needed to grant a stay, which may be less than the amount of the full judgment "when the creditor's interest . . . would not be unduly endangered"), *rev'd on other grounds*, 481 U.S. 1 (1987); *Fed. Prescription Serv.*, 636 F.2d at 758 (citing authorities holding that courts can take into account financial hardship and alternative assurances of payment when setting the required supersedeas bond amount); *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) (allowing the district court to require less than a full security supersedeas bond if the judgment debtor can demonstrate reasons for doing so).

<sup>26</sup> See, e.g., S.D. FLA. R. 62.1(a) (requiring the full amount of the judgment plus ten percent); E.D. LA. R. 62.2 (judgment plus twenty percent); D. MASS. R. 62.2 (judgment plus ten percent); N.D. TEX. R. 62.1 (judgment plus twenty percent).

<sup>27</sup> 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 7:19 (10th ed. 2013); see also Rendleman, *supra* note 1, at 1100 (providing a list of "good cause" factors that might move a federal judge "to dispense with an appeal bond or to set a lower bond").

<sup>28</sup> See, e.g., *Hurley*, 944 F. Supp. at 377-78 (declining to waive or modify the bond requirement solely on the basis of a judgment debtor's "prospective inability to pay"); *Endress + Hauser, Inc. v. Hawk Measurement Sys. Pty. Ltd.*, 932 F. Supp. 1147, 1148-49, 1150-52 (S.D. Ind. 1996).

found that the potentially insolvent judgment debtor failed to carry his burden of proving “good cause,” as required by former Rule 73(d), for lifting the requirement of a full supersedeas bond.

B. *Staying Judgments on Appeal in the State Courts and the  
Push for Appeal Bond Reform*

The state court systems also have procedures that allow judgment debtors to stay execution of a judgment during the pendency of an appeal, provided the judgment debtor secures the damages award, usually by supersedeas bond. Prior to 2000, state supersedeas bond provisions fell into three broad categories: (1) provisions granting judges the discretion to set the bond at an amount they deemed appropriate (or to provide for alternative security arrangements), similar to the federal system described above; (2) provisions mandating the supersedeas bond to cover the amount of the full judgment (or the full judgment plus costs and interest);<sup>29</sup> and (3) provisions allowing an automatic stay upon appeal without requiring any supersedeas bond at all.<sup>30</sup> However, in response to several massive jury verdicts arising from the tobacco litigation, the tort reform movement led a concerted effort to reform state appeal bond statutes.<sup>31</sup> Several other enormous jury verdicts outside the tobacco arena, including *Texaco Inc. v. Pennzoil Co.*,<sup>32</sup> *O’Keefe v. Loewen Group, Inc.*,<sup>33</sup> and the judgment resulting

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(refusing to grant a judgment debtor a stay, despite the threat of insolvency, because the debtor could not demonstrate a likelihood of success on appeal and did not present an alternate plan to provide adequate security in lieu of a supersedeas bond); *United States v. Kurtz*, 528 F. Supp. 1113, 1115 (E.D. Pa. 1981) (indicating that an unsupported allegation of financial inability to post a bond would not suffice in convincing the court to waive the bond requirement).

<sup>29</sup> See, e.g., TEX. R. CIV. P. 364(b) (repealed 1986) (“When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.”).

<sup>30</sup> See, e.g., ME. R. CIV. P. 62(e) (“[T]he taking of an appeal from a judgment shall operate as a stay of execution upon the judgment during the pendency of the appeal, and no supersedeas bond or other security shall be required as a condition of such stay.”).

<sup>31</sup> See Rendleman, *supra* note 1, at 1108 (“A \$164 billion appeal bond in a smokers’ class action . . . ushered in the first wave of appeal-bond cap legislation.”); see also *Appeal Bond Reform*, AM. TORT REFORM ASS’N, <http://www.atra.org/issues/appeal-bond-reform> (last visited Feb. 21, 2014) [hereinafter ATRA] (listing appeal bond reform as one of the tort reform issues on which the American Tort Reform Association (ATRA) focuses and stating ATRA’s support for “appeal bond reform legislation that limits the size of an appeal bond when a company is not liquidating its assets or attempting to flee from justice”).

<sup>32</sup> 784 F.2d 1133 (2d Cir. 1986), *rev’d*, 481 U.S. 1 (1987). This case involved a tortious interference with contract claim that arose out of a failed corporate takeover attempt and resulted in an \$11.12 billion award. *Id.* at 1137.

<sup>33</sup> No. 91-67-423 (Miss. Cir. Ct. 1995), *collaterally reviewed by* *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), 42 I.L.M. 811 (2003); see also



from the Exxon Valdez oil spill,<sup>34</sup> provided additional motivation for tort reformers to push for appeal bond reform.<sup>35</sup>

### 1. Motivation for Appeal Bond Reform

One of the problems flowing from massive damages awards was the cost to obtain a supersedeas bond, which could be prohibitively expensive, even for large multinational corporations.<sup>36</sup> A corporate defendant attempting to stay execution of a hypothetical jury verdict of \$500 million in a state requiring a supersedeas bond in the amount of 125% of the judgment would have to put up \$625 million to secure the bond, plus an additional 1% to 3% premium to the surety company.<sup>37</sup> A defendant's failure to post a bond in such a case would allow the plaintiff to collect on the judgment, possibly forcing the defendant into dire financial straits or bankruptcy, even if the defendant has a valid basis for appeal. However, the alternative is just as bleak—the cost of posting the supersedeas bond can throw the corporate defendant into bankruptcy, with severe consequences for the business, its employees, and its other creditors.<sup>38</sup> The Second Circuit faced these issues in *Texaco* when Texaco argued that Texas's mandatory supersedeas bond statute—which would have required a bond of more than \$12 billion to stay execution of the \$11.12 billion judgment—violated its constitutional due process rights.<sup>39</sup> The Second Circuit agreed, holding that it would be impossible for Texaco to post a \$12 billion bond, despite having a net worth of \$23 billion: obtaining a bond of such magnitude would push the company into liquidation or bankruptcy.<sup>40</sup> The court went on to explain that the

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Rendleman, *supra* note 1, at 1128 (explaining how the Canadian defendant Raymond Loewen, unable to pay for an appeal bond of 125% of the \$500 million verdict, thought “that the bond requirement foreclosed his right to appeal” and decided to settle for \$129 million).

<sup>34</sup> See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 481 (2008) (noting that the original jury verdict against Exxon totaled \$5 billion, and was subsequently reduced to \$2.5 billion by the court of appeals).

<sup>35</sup> See Rendleman, *supra* note 1, at 1089-90 (summarizing “lawsuits with blockbuster damages,” including *Texaco*, *O’Keefe*, and the Exxon Valdez suit).

<sup>36</sup> See *id.* at 1102-03; see also ATRA, *supra* note 31 (noting that appealing a billion-dollar verdict “can force an individual, a company, or an industry into bankruptcy”).

<sup>37</sup> See, e.g., Rendleman, *supra* note 1, at 1102 & n.54, 1128; Jonathan Harr, *The Burial*, NEW YORKER, Nov. 1, 1999, at 70, 93.

<sup>38</sup> See Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past*, 31 U. DAYTON L. REV. 173, 183 (2006) (naming workers and shareholders as victims of bond-induced bankruptcy); Rendleman, *supra* note 1, at 1129-30 (noting that bankruptcy harms not only the judgment debtor, but also its creditors, suppliers, employees, shareholders, and the state’s business climate).

<sup>39</sup> *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1136-39 (2d Cir. 1986), *rev’d*, 481 U.S. 1 (1987).

<sup>40</sup> *Id.* at 1138, 1152.

mandatory bond requirement lacked “any rational basis, since it would destroy Texaco and render its right to appeal in Texas an exercise in futility.”<sup>41</sup> Looking instead to the discretionary approach of the federal courts in setting supersedeas bond amounts, the court allowed Texaco to post a bond in an amount substantially less than the \$12 billion demanded by the Texas state courts.<sup>42</sup>

To alleviate the injustice of imposing severe obstacles to a defendant’s ability to appeal, tort reformers began a movement to sway state legislatures to cap the amount a defendant must pay to secure a supersedeas bond.<sup>43</sup> However, the political will to adopt appeal bond reform measures did not materialize in state legislatures until 2000, when massive jury verdicts against tobacco companies threatened the payment streams that states were receiving under the Master Settlement Agreement (MSA).<sup>44</sup> As a consequence, the first wave of appeal bond reform legislation largely focused on limiting the amount a signatory to the MSA (i.e., the tobacco companies facing multibillion dollar verdicts and their successors and affiliates) could be forced to pay to secure a supersedeas bond.<sup>45</sup> Since 2000, however, appeal bond reform has swept the nation, with many states passing statutes that apply to *any* defendant in a civil case, not just signatories to the MSA. Currently, forty-one states cap appeal bonds, either legislatively or by court rule.<sup>46</sup> Five additional states automatically suspend execution of a judgment when a case is on appeal without requiring the defendant to post a supersedeas bond.<sup>47</sup> Four states have not capped appeal bonds in any manner.<sup>48</sup>

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<sup>41</sup> *Id.* at 1145.

<sup>42</sup> *Id.* at 1154-57.

<sup>43</sup> See *supra* note 31 and accompanying text.

<sup>44</sup> Behrens & Crouse, *supra* note 38, at 183; Rendleman, *supra* note 1, at 1108, 1112; see also N.J. STAT. ANN. § 52:4D-13(a)(3) (West 2009) (“If a tobacco company faced with a large judgment could not afford to post a bond under State law it might be forced to declare bankruptcy, and this could interrupt the flow of payments to the State under the [MSA].”).

<sup>45</sup> See Rendleman, *supra* note 1, at 1108-16. For an example of this type of appeal bond reform statute, see CAL. HEALTH & SAFETY CODE § 104558(a) (West 2005), which imposes an appeal bond cap of \$150 million for MSA signatories and their affiliates and successors.

<sup>46</sup> See ATRA, *supra* note 31 (listing forty states that have passed appeal bond reform legislation and providing a brief description of the cap each state has instituted). In addition to the forty states listed on the ATRA website, Illinois has also passed a cap on appeal bonds. See 735 ILL. COMP. STAT. 5/2-1306 (2013).

<sup>47</sup> These states are Connecticut, Maine, Massachusetts, and Vermont. See CONN. R. APP. P. § 61-11; ME. R. CIV. P. 62(e); MASS. R. CIV. P. 62(d); VT. R. CIV. P. 62(d).

<sup>48</sup> These states are Alaska, Delaware, Maryland, and New York. See ALASKA R. APP. P. 204(d), 603(a); DEL. CT. C.P.R. 62(c); MD. RULES 8-423; N.Y. C.P.L.R. 5519 (McKinney 1995).

## 2. Varieties of Appeal Bond Reform Statutes and Their Underlying Rationales

The forty-one states with reform statutes have passed a variety of appeal bond caps. Some states have only capped the amount necessary to secure punitive damages,<sup>49</sup> while others have capped the amount necessary to secure all damages.<sup>50</sup> Some states allow appeal bond caps to protect all civil defendants,<sup>51</sup> others have special appeal bond caps that apply to small businesses,<sup>52</sup> and many other states cap appeal bonds only for MSA signatories and their successors and affiliates.<sup>53</sup> To protect judgment creditors, the states that do cap appeal bonds allow a bond up to the full judgment amount if a court finds that the judgment debtor is intentionally dissipating his assets to avoid paying the judgment.<sup>54</sup>

The variety of appeal bond cap provisions is explained by the different rationales set forth to support them. As discussed above, an initial motivating factor for state legislatures was the need to protect the payment streams that states derived from the MSA.<sup>55</sup> Nevertheless, there are many other arguments that support appeal bond caps. First and foremost, appeal bond caps protect the right of a defendant to appeal without immediately forcing that defendant into bankruptcy as a consequence.<sup>56</sup> Since it is not uncommon for excessive jury verdicts to eventually get overturned on appeal, a prohibitive supersedeas bond requirement allows some erroneous judgments

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<sup>49</sup> See, e.g., IDAHO CODE ANN. § 13-202(2) (2010) (instituting a cap of \$1 million).

<sup>50</sup> See, e.g., COLO. REV. STAT. ANN. § 13-16-125 (West 2005) (instituting a cap of \$25 million).

<sup>51</sup> See, e.g., *id.* (creating a cap for supersedeas bonds “[i]n any civil action brought under any legal theory”).

<sup>52</sup> See, e.g., HAW. REV. STAT. § 607-26(1) (Supp. 2011) (providing a cap of \$1 million).

<sup>53</sup> See, e.g., N.J. STAT. ANN. § 52:4D-13(b) (West 2009) (capping supersedeas bond amounts “in civil litigation under any legal theory involving a signatory, a successor of a signatory, or any affiliate of a signatory to the [MSA]”).

<sup>54</sup> See, e.g., *id.* § 52:4D-13(c) (“[I]f an appellee proves by a preponderance of the evidence that an appellant is dissipating assets outside the ordinary course of business to avoid payment of a judgment, a court may [order the appellant] . . . to post a bond in an amount up to the total amount of the judgment.”).

<sup>55</sup> See *supra* notes 44-45 and accompanying text.

<sup>56</sup> See Behrens & Crouse, *supra* note 38, at 184-85 (arguing for an appeal bond reform act “intended to ensure that a defendant can appeal a massive judgment without being put out of business”); Rendleman, *supra* note 1, at 1125 (“Appeal bond caps are necessary so that defendants don’t have to go bankrupt merely to pursue an appeal . . . .” (internal quotation marks omitted)); see also Ariz. House of Representatives Comm. on Judiciary, House of Representatives Committee on Judiciary Minutes (Mar. 3, 2011), 50th Leg., 1st Reg. Sess. (2011) [hereinafter Meeting Minutes] (statement of Marcus Osborn, Manager of Government and Public Affairs, Arizona Manufacturers Council and Arizona Chamber of Commerce), available at [http://www.azleg.gov/legtext/50leg/1R/comm\\_min/House/030311%20JUD.PDF](http://www.azleg.gov/legtext/50leg/1R/comm_min/House/030311%20JUD.PDF) (justifying an appeal bond cap on the basis that a business’s ability to perform should not be hindered by having to set aside resources to appeal).

to evade review by appellate courts.<sup>57</sup> Second, by facilitating appellate review of potentially erroneous judgments, appeal bond caps help preserve the judicial system's reputation for fairness and accuracy.<sup>58</sup> Third, and crucial to the *Erie* analysis below, massive bonding requirements can create an unfair negotiating advantage for plaintiffs in settlement discussions.<sup>59</sup> If a defendant knows or suspects that he will not be able to afford the appeal bond, a plaintiff could pressure the defendant into a settlement he would not otherwise have accepted.<sup>60</sup> Fourth, appeal bond caps protect a defendant company's constituents, including its employees and other creditors, from the risk of the defendant entering bankruptcy in order to appeal a trial court judgment.<sup>61</sup> As evidenced by the range of appeal bond caps that states have employed, some arguments exert greater influence than others.

Given the variety of rationales and appeal bond reform statutes adopted by the states, the question arises whether federal district courts sitting in diversity must abide by the directive of a state appeal bond cap when setting the amount of a supersedeas bond, or whether a district court can, in its discretion, set an amount above the state statutory cap.

## II. BRIEF OVERVIEW OF THE COURT'S *ERIE* DOCTRINE EVOLUTION

In *Hanna v. Plumer*,<sup>62</sup> the Supreme Court clarified that the "*Erie* doctrine"<sup>63</sup> could be broken down into two distinct parts.<sup>64</sup> First, when confronted

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<sup>57</sup> See Rendleman, *supra* note 1, at 1125 ("If defendant's appeal is precluded by inability to post an exorbitant appeal bond, an appellate court's ability to correct error and formulate legal standards will be frustrated.").

<sup>58</sup> See *id.* at 1146 ("[A]n appeal is . . . a basic component of our idea of a fair and accurate decisionmaking system.").

<sup>59</sup> See *id.* at 1126 (arguing that requiring appeal bonds in the full value of the judgment gives the plaintiff unfair leverage in settlement negotiations); see also Meeting Minutes, *supra* note 56 (statement of Sen. Al Melvin) (stating that the appeal bond reform legislation would encourage proper settlements); Behrens & Crouse, *supra* note 38, at 184 ("[T]o add insult to injury, the defendant will most likely be forced to settle on unfavorable terms and pay a premium because it has been placed over a barrel."). As to the impact of a changed settlement landscape on the *Erie* analysis, at least one scholar has argued that a federal court cannot choose a rule that would alter the "expected value" of a claim in litigation. Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 880-81 (2011).

<sup>60</sup> See, e.g., Harr, *supra* note 37, at 93-95 (discussing Raymond Loewen's predicament in *O'Keefe*).

<sup>61</sup> See *supra* note 38 and accompanying text.

<sup>62</sup> 380 U.S. 460 (1965).

<sup>63</sup> In *Erie Railroad v. Tompkins*, the Supreme Court had to decide whether state law or federal law determined the duty of care standard in a typical personal injury case arising out of a train accident. 304 U.S. 64, 629-70 (1938). In overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)—which held that federal courts were "free to exercise an independent judgment as to what the common law of the State is—or should be," *Erie*, 304 U.S. at 71 (citing *Swift*, 41 U.S. (16 Pet.) at

with a possible vertical choice-of-law issue, a federal court must ask whether the Constitution or Congress has already directed that federal law apply in the given scenario.<sup>65</sup> Professor Freer has termed this analysis the “*Hanna* prong” of the *Erie* doctrine.<sup>66</sup> If a constitutional provision,<sup>67</sup> Federal Rule,<sup>68</sup> or federal statute<sup>69</sup> controls the issue at hand, it will trump contrary state law unless the federal directive is invalid.<sup>70</sup> For a Federal Rule to be valid, it must meet the requirements of the Rules Enabling Act (REA) and not “abridge, enlarge or modify any substantive right.”<sup>71</sup> Since the choice-of-law decision is clear if a court finds that there is a valid Federal Rule on point, the crucial analysis under the *Hanna* prong is whether the Federal Rule “controls the issue.”<sup>72</sup> When there is no constitutional provision or congressional directive on point, a court undertakes the second part of the analysis under the *Erie* doctrine, what Professor Freer has termed the “RDA prong.”<sup>73</sup> However, this analysis leads a court down the murky and often

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18)—the *Erie* Court held that “[t]here is no federal general common law.” *Id.* at 78. Instead, the law of the state should be applied in suits brought in federal court pursuant to diversity jurisdiction, unless the “matters [are] governed by the Federal Constitution or by Acts of Congress.” *Id.* Ultimately, the *Erie* doctrine demands that when federal courts sitting in diversity are ruling on questions of substantive state law, they must apply the state’s substantive law, but are free to impose federal procedural law. *Hanna*, 380 U.S. at 465. The *Erie* decision was largely motivated by the Court’s concern with the preferential treatment that out-of-state citizens could receive by choosing to bring their suits in federal court. *Erie*, 304 U.S. at 74-75. The two effects of this injustice—forum shopping and the inequitable administration of the laws—would later become known as the “twin aims of *Erie*.” *See, e.g., Hanna*, 380 U.S. at 468.

<sup>64</sup> *See, e.g.,* Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1637 (1998).

<sup>65</sup> *Id.* (citing *Hanna*, 380 U.S. at 471).

<sup>66</sup> *Id.*

<sup>67</sup> *See* U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *see also* 28 U.S.C. § 1652 (2006) (mandating that state law govern civil actions except where the “Constitution or treaties of the United States or Acts of Congress” provide otherwise).

<sup>68</sup> *See Hanna*, 380 U.S. at 471 (clarifying that there is no *Erie* analysis to be made “[w]hen a situation is covered by one of the Federal Rules”).

<sup>69</sup> *See Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) (“[A] district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress’ constitutional powers.”).

<sup>70</sup> *Id.*; *Hanna*, 380 U.S. at 471.

<sup>71</sup> 28 U.S.C. § 2072(b) (2006). The Supreme Court has never found a Federal Rule to violate the REA. Elizabeth Chamblee Burch, *Introduction: Dukes v. Wal-Mart Stores, Inc.*, 63 VAND. L. REV. EN BANC 91, 101 (2010), <http://www.vanderbiltlawreview.org/articles/2010/10/Burch-Introduction-to-Dukes-Roundtable-77-Vand.-L.-Rev.-En-Banc-10-2010.pdf>.

<sup>72</sup> *Stewart*, 487 U.S. at 27.

<sup>73</sup> Freer, *supra* note 64, at 1637 (deriving this name from the Rules of Decision Act, 28 U.S.C. § 1652).

unhelpful path of distinguishing between matters of “substance” and “procedure.”<sup>74</sup>

#### A. *The Evolution of the Court’s Hanna-Prong Analysis*

The Court has grappled with interpreting the Federal Rules for over sixty years.<sup>75</sup> At times, the Court has construed the Federal Rules narrowly to avoid addressing a conflict with the REA or a contrary state law.<sup>76</sup> In other cases, the Court has interpreted the Federal Rules broadly to find a conflict and have the Federal Rule govern.<sup>77</sup> As an example of the former trend, in *Semtek International Inc. v. Lockheed Martin Corp.*,<sup>78</sup> the Court purposefully sidestepped the REA when it had to interpret the language of FRCP 41(b).<sup>79</sup> Despite Rule 41(b)’s directive that “any dismissal not under this rule” (as was the case in *Semtek*) “operates as an adjudication on the merits,”<sup>80</sup> the Court decided that a judgment “on the merits” was not “necessarily a judgment entitled to claim-preclusive effect.”<sup>81</sup> As commentators have pointed out, “the Court’s interpretation strain[ed] the Rule’s text and contraven[e]d its history” in order to escape a conflict with the REA.<sup>82</sup> The Court similarly gave FRCP 3 a narrow construction in *Walker v. Armco Steel Corp.*, holding that the plain meaning of the rule was that it “governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.”<sup>83</sup> In so doing, the

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<sup>74</sup> See *id.*

<sup>75</sup> See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 556-57 (1949) (construing the scope of Rule 23 to allow for the application of state law).

<sup>76</sup> See *infra* notes 78-84, 87-88 and accompanying text.

<sup>77</sup> See *infra* notes 85-86, **Error! Bookmark not defined.**-94 and accompanying text.

<sup>78</sup> 531 U.S. 497 (2001).

<sup>79</sup> See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring) (citing *Semtek* as a case where the Court avoided interpreting FRCP 41(b) in a way that would violate the REA’s jurisdictional limitation).

<sup>80</sup> FED. R. CIV. P. 41(b).

<sup>81</sup> *Semtek*, 531 U.S. at 503.

<sup>82</sup> Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1150 (2002) (citing Stephen B. Burbank, *Semtek*, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1039-47 (2002)).

<sup>83</sup> 446 U.S. 740, 751 (1980). *But see id.* at 750 n.9 (“This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a ‘direct collision’ with state law. The Federal Rules should be given their plain meaning.”). Interestingly, seven years later, when the Court had another opportunity to consider Rule 3 in the context of a federal question case, the Court interpreted it as a tolling provision, to the exclusion of the timing requirements contained within the federal statute that served as the basis of the lawsuit. *West v. Conrail*, 481 U.S. 35, 39-40 (1987).

Court avoided a conflict between Rule 3 and an Oklahoma state law regarding statute of limitations.<sup>84</sup>

In contrast, in *Burlington Northern Railroad v. Woods*, the Court gave FRAP 38 an expansive meaning, vesting broad discretion in federal judges to assess “just damages” when sanctioning a frivolous appeal.<sup>85</sup> The Court determined that a conflicting state rule, which mandated a ten percent penalty when certain conditions were met, would have impermissibly limited this discretion and was therefore displaced by the Federal Rule.<sup>86</sup> Nearly a decade later in *Gasperini v. Center for Humanities, Inc.*, the Court, citing *Walker*, instructed that federal courts interpret the scope of the Federal Rules “with sensitivity to important state interests and regulatory policies.”<sup>87</sup> This ruling cast some doubt on the instruction the Court gave in *Walker*—to read the Federal Rules according to their plain meaning.<sup>88</sup>

In the Court’s most recent pronouncement on demarcating the scope of the Federal Rules, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, the majority interpreted FRCP 23 very broadly.<sup>89</sup> At issue was a New York state tort reform measure, Civil Practice Law and Rules (CPLR) § 901(b), which prohibited class actions for certain types of claims.<sup>90</sup> The Court rejected the argument that Rule 23 and § 901(b) could coexist if they were interpreted such that Rule 23 reached the issue of class “certifiability” while § 901(b) addressed class “eligibility.”<sup>91</sup> The Court instead guaranteed a conflict with state law, and as a valid procedural rule, Rule 23 controlled the issue in the case.<sup>92</sup> Importantly, Justice Scalia, desiring a uniform application of the Federal Rules, declared that a Federal Rule’s validity does not depend on the state interest involved.<sup>93</sup> Rather, the validity of a Federal Rule under the REA is entirely dependent on whether it can reasonably be classified as procedural.<sup>94</sup> While the Court has taken different approaches in

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<sup>84</sup> *Walker*, 446 U.S. at 752.

<sup>85</sup> 480 U.S. 1, 6–8 (1987).

<sup>86</sup> *Id.* at 3, 8.

<sup>87</sup> 518 U.S. 415, 427 n.7 (1996).

<sup>88</sup> See Freer, *supra* note 64, at 1643 (“[T]he Court . . . may have replaced the search for ‘plain meaning’ with a heightened sensitivity to potential impact on state policy.”).

<sup>89</sup> 130 S. Ct. 1431 (2010).

<sup>90</sup> *Id.* at 1436–37 (majority opinion).

<sup>91</sup> *Id.* at 1438.

<sup>92</sup> As noted above, the Court has never found a Federal Rule to violate the REA. See Burch, *supra* note 71, at 101.

<sup>93</sup> *Shady Grove*, 130 S. Ct. at 1444 (plurality opinion).

<sup>94</sup> *Id.*

interpreting the Federal Rules, when a particular rule is found to govern, the outcome is unavoidable: a federal court must apply it.<sup>95</sup>

### B. *The Evolution of the Court's RDA-Prong Analysis*

Conducting an analysis under the RDA prong, the *Erie* Court overturned *Swift v. Tyson*<sup>96</sup>—which had allowed federal courts exercising diversity jurisdiction to ignore “the unwritten law of the State as declared by its highest court”—and instead permitted the courts “to exercise an independent judgment as to what the common law of the State is—or should be.”<sup>97</sup> In *Erie*, no constitutional or congressional directive addressed what duty of care a railroad company owed to pedestrians; as a result, the Court directed federal courts to apply a state’s substantive law when faced with state substantive law claims in diversity suits.<sup>98</sup> This makes sense since the basic principles of federalism suggest that the Constitution does not give the federal courts authority to create substantive law.<sup>99</sup> Consequently, state substantive law should apply, even in federal courts.<sup>100</sup> In the decades following *Erie*, however, the Court’s approach to the RDA prong went through several iterations.

#### 1. Outcome-Determinative Approach

First, in the two decades following *Erie*, the Court gravitated toward an “outcome-determinative” approach to the RDA prong, most famously exemplified in *Guaranty Trust Co. v. York*.<sup>101</sup> The *Guaranty Trust* Court interpreted *Erie* to mandate that “in all cases where a federal court [exercises diversity jurisdiction], the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”<sup>102</sup> However, as the lower courts quickly realized, virtually every law, whether substantive or

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<sup>95</sup> See *id.* at 1437 (majority opinion) (“The framework for our decision is familiar. We must first determine whether [the Federal Rule] answers the question in dispute. If it does, it governs . . . .” (citation omitted)).

<sup>96</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>97</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64, 71, 79–80 (1938).

<sup>98</sup> *Id.* at 78.

<sup>99</sup> See Freer, *supra* note 64, at 1645 (“The constitutional basis of *Erie* is the principle, inherent in federalism and embodied in the Tenth Amendment, of reserved powers. Because the federal courts have no enumerated authority under the Constitution to prescribe rules of substantive law in diversity cases, state law *must* govern.” (footnote omitted)).

<sup>100</sup> See *id.*

<sup>101</sup> 326 U.S. 99 (1945).

<sup>102</sup> *Id.* at 109.



procedural, could have an outcome-determinative effect.<sup>103</sup> Unless the federal courts sitting in diversity were to become clones of their state court counterparts, the outcome-determinative test alone could not reliably resolve the choice-of-law conflict.

## 2. Federal–State Interest-Balancing Approach

With its 1958 decision in *Byrd v. Blue Ridge Rural Electric Cooperative*,<sup>104</sup> the Court began to supplement the outcome-determinative test. Outcome determination *alone* would not be decisive; instead, the Court created a three-step analysis to determine whether state or federal law should apply.<sup>105</sup> First, a federal court must ask whether state law determines the rights and obligations of the parties—whether the state law at issue is “bound up” with state rights and obligations.<sup>106</sup> Second, if it is not clear that the state law at issue is substantive, federal courts should conduct an outcome-determinative test.<sup>107</sup> However, even if applying federal law could, or would, lead to a different outcome, federal law should apply if there are “affirmative countervailing considerations” favoring the federal law.<sup>108</sup> Third, if applying federal law would not be outcome-determinative, the Court suggested that federal courts balance the state interests involved with the countervailing interests of the federal judicial system.<sup>109</sup> If a state’s interests are sufficiently strong, then absent a compelling federal policy reason to apply the federal law, a federal court should apply the state’s law.<sup>110</sup>

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<sup>103</sup> See Freer, *supra* note 64, at 1647 (“To take an absurd example, a rule that pleadings be on a certain length of paper will determine the outcome if the plaintiff tries to file a complaint on nonconforming paper.”). Note that the Court in *Erie*, while very much concerned with litigant equality, did not pass judgment on the need for outcome equality. *Id.* at 1645-46. It was the *Guaranty Trust* Court that largely “converted the concern for *litigant* equality to a concern for *outcome* equality.” *Id.*

<sup>104</sup> 356 U.S. 525 (1958).

<sup>105</sup> See Freer, *supra* note 64, at 1647 (noting that while “there are other interpretations of *Byrd*, the most literal proceeds in three steps” (footnote omitted)).

<sup>106</sup> *Byrd*, 356 U.S. at 535.

<sup>107</sup> *Id.* at 536-37.

<sup>108</sup> *Id.* at 537-38. In *Byrd*, the important federal interest in the proper allocation of power between judge and jury was strong enough to apply the federal rule even if there was a chance that doing so would be outcome-determinative. *Id.*

<sup>109</sup> See Freer, *supra* note 64, at 1650; cf. 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4504, at 36-40 (2d ed. 1996) (describing different formulations of the *Byrd* balancing test).

<sup>110</sup> Cf. Freer, *supra* note 64, at 1650. (“The federal courts can . . . be conscripted to help enforce a state policy, but not if doing so will harm the integrity of the federal judicial system.” (citing *Byrd*, 356 U.S. at 538)).

However, the *Byrd* test was plagued with its own ambiguities, such as deciphering which countervailing federal interests justified departing from a state rule.<sup>111</sup> As a consequence, the *Byrd* test never quite took hold in the lower courts, and when the Supreme Court next addressed the *Erie* doctrine in *Hanna v. Plumer*, the Court barely mentioned its *Byrd* balancing test, leaving many to question whether the *Byrd* test remained a viable framework for an *Erie* problem.<sup>112</sup>

### 3. Modified Outcome-Determinative Approach

In *Hanna*, the Court returned to the initial underpinnings of *Erie*, seeking to prevent (1) vertical forum shopping (litigants choosing to sue in federal court rather than in state court) and (2) the inequitable administration of the laws (diverse parties obtaining more favorable outcomes in federal court than in state court).<sup>113</sup> Therefore, under *Hanna*, the question is not simply whether the outcome would be different in federal court, but whether application of federal law would produce forum shopping or the inequitable administration of the laws.<sup>114</sup> Importantly, the Court clarified that a state law would only apply if the inquiry were answered in the affirmative *ex ante*—that is, at the time when the plaintiff decides where to file suit.<sup>115</sup> Setting aside the fact that the Court's RDA analysis in *Hanna* was dictum, one of the more troubling questions arising out of *Hanna* was how this new test was to be applied in conjunction with the previous tests announced by the Court.<sup>116</sup> Instead of repudiating one test and replacing it with another, the Court continued to create new approaches without advising how the different tests would work together.

### 4. A Rebirth of *Byrd*?

Although commentators still debate whether *Byrd* survived *Hanna*,<sup>117</sup> the Court made clear in *Gasperini v. Center for Humanities, Inc.* that the *Byrd*

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<sup>111</sup> See 19 WRIGHT, MILLER & COOPER, *supra* note 109, § 4504, at 36.

<sup>112</sup> See *id.* at 48-49 ("The status of the *Byrd* case . . . is less certain."); Freer, *supra* note 64, at 1653-54 (questioning the status of the *Byrd* test following *Hanna*).

<sup>113</sup> See *Hanna v. Plumer*, 380 U.S. 460, 467 (1965).

<sup>114</sup> *Id.* at 468 ("The outcome-determination test . . . cannot be read without reference to the twin aims of the *Erie* rule . . . ." (internal quotation marks omitted)).

<sup>115</sup> *Id.* at 468-69.

<sup>116</sup> See Freer, *supra* note 64, at 1653-54 (raising the question "of how *Byrd* [was] to function with the twin aims test" given that the *Hanna* Court did not discuss or "purport to overrule" *Byrd*).

<sup>117</sup> See, e.g., Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1001-02 (2011) (arguing that *Byrd* did survive *Hanna*).

balancing test was alive and well.<sup>118</sup> Interestingly, the Court decided to revive *Byrd* in the context of its *Hanna*-prong analysis, not its RDA analysis.<sup>119</sup> Nonetheless, it became clear that the *Byrd* balancing test was still a valid interpretive tool, as balancing the state and federal interests at play is a helpful exercise when conducting an RDA analysis.

In *Gasperini*, the Court dealt with a New York state law, CPLR § 5501(c), that set forth a standard for appellate review of jury verdicts and gave appellate courts the power to order a remittitur when the award “deviat[ed] materially from what would be reasonable compensation.”<sup>120</sup> This case presented two distinctive *Erie* conflicts: (1) a conflict with the Seventh Amendment’s Reexamination Clause; and (2) a conflict with FRCP 59(a).<sup>121</sup> With regard to the Seventh Amendment conflict, the Court had to decide both the proper standard in the trial court for reviewing a motion to alter a jury verdict and the proper standard for appellate review of the trial court’s determination.<sup>122</sup> Here, the Court, discussing the *Byrd* balancing test, decided it could accommodate the state and federal interests at play by having the *trial court* apply New York’s “deviates materially” standard while allowing a federal appellate court to review the trial court’s determination using an “abuse of discretion” standard.<sup>123</sup> Additionally, by permitting a district court to order a new trial when a jury verdict “deviated materially” from what would be reasonable compensation, the *Gasperini* majority concluded that Rule 59(a) was not instructive on the standard to be used in evaluating jury awards, and consequently, on whether a new trial should be granted.<sup>124</sup>

Had Rule 59(a) covered the issue, as Justice Scalia argued in dissent, *Hanna* clearly required that the Federal Rule govern.<sup>125</sup> The majority, acknowledging the difficulty in distinguishing between matters of substance and procedure, viewed the New York directive as a procedural mechanism

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<sup>118</sup> See 518 U.S. 415, 431-32 (1996) (discussing and citing to *Byrd*). But see Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1949 (2006) (arguing that the Court has not revived *Byrd* and pointing out that the *Gasperini* Court “ignored [*Byrd*] in dealing with the problem on which it might have made a difference and invoked [*Byrd*] on the problem for which it was redundant” (footnote omitted)).

<sup>119</sup> See Freer, *supra* note 64, at 1656 (observing that “the RDA discussion in *Gasperini* does not mention *Byrd*”).

<sup>120</sup> *Gasperini*, 518 U.S. at 418.

<sup>121</sup> See *id.* at 426, 433.

<sup>122</sup> *Id.* at 433-35.

<sup>123</sup> *Id.* at 437-38.

<sup>124</sup> See *id.* at 433 (interpreting Rule 59(a) as saying simply that federal courts could grant a new trial after a jury trial on any ground recognized at common law).

<sup>125</sup> See *id.* at 467-68 (Scalia, J., dissenting).

with substantive goals.<sup>126</sup> In this way, the majority interpreted Rule 59(a) “with sensitivity to important state interests and regulatory policies” in order to avoid a conflict,<sup>127</sup> thereby distancing the Court from *Walker*’s directive to interpret the Federal Rules in accordance with their plain meaning.<sup>128</sup>

### III. APPLYING THE *ERIE* DOCTRINE TO STATE APPEAL BOND REFORM STATUTES AND FEDERAL RULE OF CIVIL PROCEDURE 62(d)

FRCP 62(d) allows a district court judge to stay execution of a judgment while a judgment debtor’s appeal works its way through the appellate process. Because Rule 62(d) does not specify the amount a judgment debtor must post in order to secure a stay, the federal courts have read the Rule consistently with former Rule 73(d), which, while expressing a preference for a bond in the amount of the judgment plus costs and interest, allowed judges discretion to accept a lesser amount if the judgment debtor could show good cause.<sup>129</sup> Any state statute that caps the amount of a supersedeas bond, if applied in federal court, would ostensibly take away the discretion federal judges have enjoyed in setting supersedeas bond amounts throughout the federal judiciary’s existence.<sup>130</sup> This Part applies the Court’s evolving *Erie* doctrine to the conflict between Rule 62(d) and state statutes capping appeal bonds.

#### A. Hanna-Prong Analysis of Rule 62(d) and State Appeal Bond Reform Provisions

Is Rule 62(d) broad enough to cover the question of how much a defendant must secure via supersedeas bond to stay enforcement proceedings

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<sup>126</sup> *Id.* at 429. The majority classified CPLR § 5501(c) as substantive because the New York directive “was designed to provide an analogous control” to statutory caps on damages, which both parties agreed were substantive. *Id.*

<sup>127</sup> *Id.* at 427 n.7.

<sup>128</sup> See Freer, *supra* note 64, at 1642-43.

<sup>129</sup> See *supra* Section I.A (describing the historical underpinnings of the supersedeas bond and the current federal practice with regard to Rule 62(d)).

<sup>130</sup> See *supra* Section I.A. Local court rules across the country have filled in the gap created when the Federal Rules of Appellate Procedure supplanted former Rule 73(d) and instruct judges as to the sufficiency of a supersedeas bond. See *supra* note 26 (providing examples of such local court rules). However, local rules are not afforded the same deference as the congressionally approved Federal Rules. See *Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261, 264 n.2 (5th Cir. 1997) (“[W]e decline to extend *Hanna*’s more lenient scrutiny of the Federal Rules of Civil Procedure to include [a] Local Rule.”).

in a case where a damages award (inclusive of compensatory and punitive damages) is in excess of a state's statutory cap on appeal bonds? In light of the wave of appeal bond reform and the significant state interests motivating these reforms, it is possible to read Rule 62(d) as not covering the entire issue of supersedeas bond requirements, but instead leaving room for the application of state statutes.<sup>131</sup>

1. State Appeal Bond Reform Statutes Do Not Affect  
Rule 62(d)'s Process Requirements

The issue of setting supersedeas bond amounts can be distinguished from the cases holding that where state supersedeas bond statutes conflict with a specific command of Rule 62, the Rule governs. For example, when a state statute prescribes a certain mandatory *process* for filing a supersedeas bond that conflicts with the mandate of Rule 62(d), the Federal Rule governs. In *Vacation Village, Inc. v. Clark County*, a Nevada statute required that a state agency deposit with the court the full judgment amount before disputing a monetary judgment on appeal.<sup>132</sup> The Ninth Circuit correctly held that this requirement directly conflicted with Rule 62(d)'s command that an appellant may secure a stay as a matter of right upon posting a satisfactory supersedeas bond.<sup>133</sup> As a "purely procedural" rule addressing the process for obtaining a stay, *Hanna* undisputedly commands federal courts sitting in diversity to apply Rule 62(d) if it covers the situation.<sup>134</sup> Similarly, other courts, when confronted with state statutes that allow for public entities to obtain a stay on appeal without posting a supersedeas bond or other form of security, have routinely held that Rule 62(d) preempts these statutes.<sup>135</sup> The rationale here is that federal courts must follow Rule 62(d)'s policy of requiring security, via supersedeas bond or

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<sup>131</sup> There are, of course, limits to this interpretation. For example, a state statute capping the amount a defendant must secure by supersedeas bond at \$1000, regardless of the amount of the judgment, would be untenable. Such a statute would violate the purpose behind Rule 62(d), which is "to preserve the status quo while protecting the non-appealing party's rights pending appeal." *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190-91 (5th Cir. 1979). A state's appeal bond reform statute cannot be allowed to make Rule 62(d) a meaningless formality. Rather, a state's statute should only apply in federal court if it promotes an important substantive state interest and does not violate the purpose behind Rule 62(d).

<sup>132</sup> 497 F.3d 902, 913 (9th Cir. 2007).

<sup>133</sup> *Id.* at 913-14.

<sup>134</sup> See *id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 465, 471-72 (1965), and *Bass v. First Pac. Networks, Inc.*, 219 F.3d 1052, 1055 (9th Cir. 2000)).

<sup>135</sup> See *Leuzinger v. County of Lake*, 253 F.R.D. 469, 474-75 (N.D. Cal. 2008) (discussing several cases holding that, when Rule 62(d) conflicts with a state law, Rule 62(d) prevails).

otherwise, before a stay is granted.<sup>136</sup> Again, however, the courts take issue with the fact that a state law is supplanting the *process* for obtaining a post-judgment stay, not the *adequacy* of a bond posted pursuant to the proper federal process.<sup>137</sup>

In contrast, state appeal bond caps do not supplant the process for securing a postjudgment stay. The appeal bond reform statutes comply with Rule 62's policy of disfavoring unsecured stays during the pendency of an appeal.<sup>138</sup> Rule 62(d) appears, by its plain meaning, to only regulate the procedure for securing a postjudgment stay. However, whether the Rule is given a narrow or broad construction will determine whether Rule 62(d) in fact covers the scenario at issue.

## 2. Appeal Bond Caps and Judicial Discretion

Appeal bond caps do, however, restrict the discretion judges can exercise in setting supersedeas bond amounts pursuant to Rule 62(d). According to *Burlington Northern Railroad v. Woods*, when a Federal Rule provides for judicial discretion, a mandatory state rule that interferes with that discretion will not be given effect in federal court.<sup>139</sup> In *Burlington Northern*, the Court interpreted FRAP 38, which gives judges the discretion to award "just damages" to an appellee upon a determination that the appellant pursued a frivolous appeal.<sup>140</sup> Rule 38 allows judges to determine the amount of damages, if any, that should be awarded on a case-by-case basis, while the conflicting state rule mandated a ten percent penalty across the board when certain criteria were met.<sup>141</sup> Reading Rule 38 broadly, the Court held the mandatory state provision inapplicable in federal courts because it would have the effect of requiring a federal court to assess specific damages, whereas the court may otherwise have assessed a lesser amount—or none at all.<sup>142</sup> Similarly, in *Stewart Organization v. Ricoh Corp.*, the Court held that a state law disfavoring forum-selection clauses was not applicable in federal

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<sup>136</sup> *Id.* at 475.

<sup>137</sup> *See id.* (holding that "Rule 62 provides the *process* for *post-judgment stays*," thereby supplanting any state law that allows for a postjudgment stay to be granted without posting security).

<sup>138</sup> *See Van Huss v. Landsberg*, 262 F. Supp. 867, 870 (W.D. Mo. 1967) ("Rule 62 . . . indicates a policy against any unsecured stay of execution after the expiration of the time for filing a motion for new trial.").

<sup>139</sup> 480 U.S. 1, 6-8 (1987); *see also* Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 242 (2010).

<sup>140</sup> 480 U.S. at 7.

<sup>141</sup> *Id.* at 3-4.

<sup>142</sup> *Id.* at 7-8.

courts if it interfered with a district court's exercise of discretion in conducting a transfer-of-venue analysis under 28 U.S.C. § 1404(a).<sup>143</sup>

A federal court could follow the approach of these cases by broadly construing FRCP 62(d) and concluding that the Rule covers the issue of setting the amount of a supersedeas bond. Under this construction, since state statutes capping supersedeas bonds would interfere with a Federal Rule's "discretionary mode of operation," these statutes should be inapplicable in the federal courts.<sup>144</sup>

This approach, however, is not a foregone conclusion. The discretionary aspect of Rule 62(d) is distinguishable from the provisions in dispute in *Burlington Northern* and *Stewart*. In *Burlington Northern*, the Court worried that the mandatory operation of the Alabama penalty provision could force a federal court to assess damages for a nonfrivolous appeal, where FRAP 38 would not have directed a judge to do so.<sup>145</sup> Likewise, in *Stewart*, the application of the Alabama statute, which discouraged the application of forum-selection clauses "providing for out-of-state venues,"<sup>146</sup> would have altered the analysis § 1404(a) demanded.<sup>147</sup> Conversely, FRCP 62(d) does not allow judges discretion to stay execution of the judgment upon the posting of a supersedeas bond; the stay is automatic once a court approves the bond.<sup>148</sup> The discretion the court retains is whether to approve the bond or not.<sup>149</sup> Thus, state appeal bond cap statutes would not be forcing judges to grant stays where they otherwise would not have done so; such statutes would only fill in the details as to the sufficiency of a supersedeas bond.

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<sup>143</sup> 487 U.S. 22, 30-31 (1988). The federal law here allows district courts, in their discretion, to transfer any civil action to another district in the country. 28 U.S.C. § 1404(a) (2006); *Stewart*, 487 U.S. at 29. The state law in question, in categorically disfavoring forum-selection clauses, would have impermissibly instructed a district court to give more weight to one factor—the presence of a forum-selection clause—than other factors in its transfer analysis. *Stewart*, 487 U.S. at 30-31.

<sup>144</sup> See *Burlington Northern*, 480 U.S. at 7. If Rule 62(d) were broad enough to control the issue, it would govern absent some contention that the Rule violated the Constitution or the REA. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

<sup>145</sup> See 480 U.S. at 8 ("Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals; the Alabama statute precludes any exercise of discretion within its scope of operation.").

<sup>146</sup> 487 U.S. at 30.

<sup>147</sup> See *id.* at 31 ("Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command.").

<sup>148</sup> Rule 62(d) states that "the appellant may obtain a stay by supersedeas bond." FED. R. CIV. P. 62(d). It does not state that the court may grant a stay if an appellant posts a supersedeas bond.

<sup>149</sup> See *id.* ("The stay takes effect when the court approves the bond.").

Rule 62(d)'s statutory predecessor, 28 U.S.C. § 874,<sup>150</sup> directed an appellant to "giv[e] the security required by law" in order to stay a judgment upon appeal.<sup>151</sup> The substance of § 874 was incorporated into Rule 62(d) and former Rule 73(d).<sup>152</sup> However, when the Federal Rules of Appellate Procedure supplanted former Rule 73(d) without incorporating its substance as to the sufficiency of a supersedeas bond, the Federal Rules lacked any explicit direction as to what security was "required by law."<sup>153</sup> Consequently, federal courts have largely continued to read Rule 62(d) in light of former Rule 73(d).<sup>154</sup> Federal supersedeas practice, both past and present, clearly evinces a policy to require an appellant to provide security on appeal. However, existing federal practice also takes into consideration circumstances when a supersedeas bond in the full amount of a judgment would not be required.<sup>155</sup> Therefore, rather than supplanting judicial discretion, one can view appeal bond caps as working in tandem with established federal policy, helping to inform the district courts as to the sufficiency of a supersedeas bond.

### 3. The Case for Accommodation

A court can simply give Rule 62(d) a narrower construction by utilizing the interpretive principles the Court described in *Gasperini v. Center for Humanities, Inc.* to avoid a conflict with state law. *Gasperini* instructed courts to interpret the Federal Rules "with sensitivity to important state interests

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<sup>150</sup> Section 874 was repealed by the 1948 Judicial Code. Act of June 25, 1948, ch. 646, 62 Stat. 869 (codified as amended at 28 U.S.C.); see also *Hudson City Sav. Bank v. Hampton Gardens Ltd.*, 438 A.2d 323, 326 n.3 (N.J. 1981).

<sup>151</sup> 28 U.S.C. § 874 (1934) (repealed 1948).

<sup>152</sup> Table Showing Disposition of All Sections of Former Title 28, 28 U.S.C. intro. (2006); see also *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 750 F. Supp. 67, 72-73 (E.D.N.Y. 1990).

<sup>153</sup> 28 U.S.C. § 874.

<sup>154</sup> See, e.g., *Strong v. Laubach*, 443 F.3d 1297, 1299 (10th Cir. 2006) (interpreting Rule 62(d) as usually requiring a bond for the full amount of the judgment, unless the district court decides to set a different amount); *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154-55 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987) (same); *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 758-59 (D.C. Cir. 1980) (same); *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) (same).

<sup>155</sup> See *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986) (setting forth two situations in which accepting alternative security might be appropriate: "where the defendant's ability to pay the judgment is so plain that the cost of the bond would be a waste of money"; and "where the requirement would put the defendant's other creditors in undue jeopardy"); *Fed. Prescription Serv.*, 636 F.2d at 757-58 (agreeing with the view that Rule 62(d) "does not prohibit the district court from exercising a sound discretion to authorize unsecured stays in cases it considers appropriate" and citing cases where courts have found it appropriate to depart from the norm of requiring a bond in the full amount of the judgment).



and regulatory policies.”<sup>156</sup> States have passed statutes capping appeal bonds with several important objectives in mind, including preserving the right to appeal massive monetary judgments without forcing a judgment debtor into bankruptcy, ensuring appellate review of erroneous judgments, protecting payment streams from signatories to the MSA, and preventing plaintiffs from obtaining an undue advantage in settlement negotiations.<sup>157</sup> Meanwhile, the countervailing federal interests appear to include preserving the discretion of district court judges in setting the amount of a supersedeas bond and the uniform application of Rule 62(d) in federal courts across the country. Rule 62(d), however, does not call into question an “essential characteristic” of the federal judiciary system, such as the allocation of power between judge and jury.<sup>158</sup>

In an effort to accommodate a state’s interest in capping an appeal bond, a court can construe Rule 62(d) simply to control the *process* of obtaining a postjudgment stay in federal courts, while allowing state law to fill in the substance of what constitutes a sufficient supersedeas bond. The Seventh Circuit grappled with this type of *Gasperini* analysis in *Houben v. Telular Corp.*, where it had to decide whether Rule 62(b) or state law governed an employer’s liability with regard to the timely satisfaction of a judgment.<sup>159</sup> At issue was a state law mandating that statutory penalties begin to accrue fifteen days after a court orders an employer to pay wages due to an employee.<sup>160</sup> Before the fifteen days expired in this case, the employer-defendant had filed a post-trial motion, implicating Rule 62(b), which grants federal judges discretion to stay execution of the judgment.<sup>161</sup> On the other hand, the state provision operated in a mandatory fashion, requiring

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<sup>156</sup> 518 U.S. 415, 427 n.7 (1996).

<sup>157</sup> See Behrens & Crouse, *supra* note 38, at 183-84; Rendleman, *supra* note 1, at 1112, 1124-26, 1145; see also MONT. CODE ANN. § 25-12-103 (2013) (instituting an appeal bond cap “in order to ensure that financial considerations do not adversely impact the right of appeal”); Meeting Minutes, *supra* note 56 (statement of Marcus Osborn, Manager of Government and Public Affairs, Arizona Manufacturers Council and Arizona Chamber of Commerce) (emphasizing that the choice to appeal should not negatively affect a business’s ability to function).

<sup>158</sup> See, e.g., *Gasperini*, 518 U.S. at 431-33 (discussing the Second Circuit’s failure to “attend to ‘[a]n essential characteristic of [the federal court] system’”—i.e., the division of power between judge and jury—“when it used [a state rule] as ‘the standard for [federal] appellate review’” (first, second, and fourth alterations in original) (citations omitted)); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537-39 (1958) (noting the “strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts”).

<sup>159</sup> 309 F.3d 1028, 1030, 1038 (7th Cir. 2002).

<sup>160</sup> *Id.* at 1030.

<sup>161</sup> *Id.* at 1029, 1038.

penalties to accrue fifteen days after a court order, regardless of any post-trial motions.<sup>162</sup>

In *Houben*, the Seventh Circuit acknowledged that *Gasperini* provided a way for the federal courts to implement “the substantive elements of [a] state statute within the framework of federal procedures.”<sup>163</sup> The court hypothesized that it could accommodate both the state statute and Rule 62 by adhering to Rule 62’s timing directives and requiring federal judges to exercise their Rule 62(b) discretion “in favor of permitting immediate execution” of a judgment to give effect to the state law.<sup>164</sup> However, the court found this accommodation to be “too much of a strain” because it would rob federal judges of their discretion to institute a stay under Rule 62(b).<sup>165</sup> Instead, the court fell back on the familiar dictates of *Hanna* and applied the valid Federal Rule to the exclusion of the conflicting state provision.<sup>166</sup>

Importantly, the Rule 62(b) conflict described in *Houben* is distinguishable from a Rule 62(d) conflict with statutes that cap appeal bonds. First, the Rule 62(b) conflict dealt with a quintessentially procedural aspect of the Federal Rules—timing, which is something that appeal bond reform statutes do not interfere with. Second, Rule 62(b) explicitly vests federal judges with the discretion to issue a stay when it provides that “the court may stay . . . execution” upon the filing of a postjudgment motion.<sup>167</sup> In contrast, the stay by supersedeas bond in Rule 62(d) is automatic when the court approves the bond.<sup>168</sup>

By interpreting Rule 62(d) to reach only the process for obtaining a stay by supersedeas bond, and by acknowledging that the judicial discretion contained in Rule 62(d) is distinct from that afforded by other Federal Rules where courts have refused to seek an accommodation between the state and federal laws, courts can accommodate states’ interests in passing appeal bond reform statutes by applying the state statutes in conjunction with Rule 62(d).

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<sup>162</sup> *Id.* at 1030–31, 1038.

<sup>163</sup> *Id.* at 1034–35.

<sup>164</sup> *Id.* at 1038.

<sup>165</sup> *Id.* at 1038–39.

<sup>166</sup> *Id.* at 1040.

<sup>167</sup> FED. R. CIV. P. 62(b).

<sup>168</sup> FED. R. CIV. P. 62(d); *see also supra* note 24 and accompanying text.

B. *RDA-Prong Analysis of Rule 62(d) and State Appeal Bond Reform Provisions*

If Rule 62(d) does not entirely cover the question of supersedeas bond amounts in cases with massive damages awards, one must dive into “the typical, relatively unguided *Erie* choice” to determine whether Rule 62(d) or a given state statute capping appeal bonds will apply.<sup>169</sup> At this point, courts often point out that federal courts sitting in diversity should “apply state substantive law and federal procedural law.”<sup>170</sup> However, this analysis has become so muddled that even the Supreme Court has called it a “challenging endeavor.”<sup>171</sup> Therefore, given the impracticality of applying the distinction, instead of attempting to classify appeal bond reform statutes as “procedural” or “substantive,” this Comment addresses the underlying state and federal interests at play.<sup>172</sup>

1. Outcome-Determinative Test

The first step in any RDA-prong analysis is to conduct *Guaranty Trust*’s outcome-determinative test, as modified by *Hanna*, with an eye to the twin aims of *Erie*. Whether the application of a federal practice will produce vertical forum shopping must be determined from an ex ante perspective—when the plaintiff is considering where to file his lawsuit.<sup>173</sup> If federal courts sitting in diversity do not apply the state statutes that cap appeal bonds, the risk of vertical forum shopping will increase.

For example, several states cap the amount a defendant must pay to obtain a stay via supersedeas bond in certain circumstances to a set percentage of the defendant’s net worth.<sup>174</sup> As a result, an astute plaintiff, hoping to win

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<sup>169</sup> *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

<sup>170</sup> *See, e.g., id.* at 465.

<sup>171</sup> *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

<sup>172</sup> *Cf. Joseph P. Bauer, Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 972-75 (2011) (discussing the futility of the substance versus procedure distinction in the context of the *Hanna* prong of the *Erie* analysis).

<sup>173</sup> *See Hanna*, 380 U.S. at 468-69 (discussing how the *Erie* doctrine concerns itself only with differences between state and federal law that influence where a litigant chooses to bring suit). Of course, one must also pay attention to the ability of a defendant to remove a case to federal court. However, for the purposes of this analysis, where it is the plaintiff attempting to evade the state appeal bond cap, this Comment focuses on the plaintiff’s initial choice of forum as implicating *Hanna*’s directive to avoid vertical forum shopping.

<sup>174</sup> *See, e.g., FLA. STAT. ANN.* § 768.733 (West 2000) (capping the amount a defendant in a certified class action must post to stay execution of a judgment at ten percent of the defendant’s net worth); *NEB. REV. STAT.* § 25-1916 (2008) (capping the amount of a supersedeas bond in any civil action at fifty percent of the defendant’s net worth); *TEX. CIV. PRAC. & REM. CODE ANN.* § 52.006 (West 2003) (same); *MISS. R. APP. P.* 8 (capping the amount of a supersedeas bond, as

a judgment in excess of the state's statutory cap, will be incentivized to sue in federal court rather than state court. The plaintiff will realize that, if nothing else, suing in federal court will provide a significant bargaining advantage in settlement negotiations. If a defendant thinks he will not be able to afford an appeal bond or will face significant financial hardship in doing so, he may be pressured into settling regardless of the merits of his arguments on appeal.<sup>175</sup> Similar results will follow from statutory caps that provide a strict monetary limit as opposed to a percentage-of-net-worth limit.<sup>176</sup>

However, the conclusion that the application of current federal practice would produce vertical forum shopping must be qualified. Even if vertical forum shopping were to occur, it would not result from the federal courts providing a different outcome per se. Rather, it would result from a plaintiff's educated decision that he could obtain a more favorable settlement in federal court than in a state court that would apply the state statute capping appeal bonds. The "expected value" of the plaintiff's claim would be altered.<sup>177</sup> Further, it would be very difficult to judge from the outset when application of Rule 62(d), as opposed to a state appeal bond reform statute, would lead to an "inequitable administration of the laws" by significantly altering the ultimate resolution of the case.

It is likely that if the analysis were to end here, a court would determine vertical forum shopping would not occur because of the countervailing pressures that could still motivate a plaintiff to sue in state court, such as a more advantageous jury pool or an increased likelihood of obtaining a significant punitive damages award. A pure *Hanna* style outcome-determination test would therefore lead most courts to follow current federal practice to the exclusion of state appeal bond reform statutes. However, if a federal court accepts the argument that the possibility of a

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to the punitive damages portion of a money judgment, at ten percent of the defendant's net worth).

<sup>175</sup> See Behrens & Crouse, *supra* note 38, at 184 (asserting that "[i]ronically, the more egregious the errors at trial, and the more outrageous the award, the more likely it is that the defendant will be unable to post a [sufficient] bond" and will be forced to settle); Harr, *supra* note 37, at 93-95 (chronicling the settlement negotiations between O'Keefe and Loewen, and suggesting the role that the mandatory appeal bond played in the settlement); Rendleman, *supra* note 1, at 1129 (explaining how the settlement in *O'Keefe* foreclosed appellate reversal of the "unfair jury verdict").

<sup>176</sup> The statutes that do cap the amount of an appeal bond in relation to a defendant's net worth typically also include a hard monetary cap and instruct courts to apply the lesser of the two. See *supra* note 174 (listing examples of such statutes).

<sup>177</sup> See Tidmarsh, *supra* note 59, at 880-81 (discussing how litigation strategies are influenced by the expected value of a claim—that is, the "product of the probability of recovery and the amount of the remedy if liability is found").

claim's "expected value" being significantly altered is sufficiently "outcome-determinative," a balancing test weighing the various state and federal interests should lead federal courts to apply the state appeal bond reform statutes.

## 2. *Byrd* Balancing of State and Federal Interests

Interestingly, when the Court conducted its RDA analysis in *Gasperini*, it limited itself to *Hanna*'s modified outcome-determinative test and did not invoke or apply the *Byrd* balancing test.<sup>178</sup> However, a comparative analysis of different federal and state interests is useful in determining whether state law or federal practice should govern.<sup>179</sup> Under *Byrd*, when the substance-procedure distinction does not yield a clear answer, one moves on to an outcome-determination analysis informed by the question of whether enforcing the state's law will further important state policies or whether there are strong countervailing federal interests at play favoring the application of the federal law or rule.<sup>180</sup>

There is no doubt that both Rule 62(d) and appeal bond reform statutes are procedural in nature.<sup>181</sup> However, this does not mean that statutes capping appeal bonds do not further substantive state policies.<sup>182</sup> Statutes instituting appeal bond caps implicate a defendant's critical rights. States that have enacted these statutes—particularly statutes applying to all civil defendants and not just to MSA signatories—have made a firm choice to preserve an attainable avenue of appeal for certain defendants by staying execution of the trial court judgment without forcing those defendants into bankruptcy or an otherwise precarious financial position simply to obtain a supersedeas bond. And while the statutes are designed in part to ensure the accuracy of judicial judgments, they also seek to influence conduct outside

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<sup>178</sup> See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 422-25, 431-33 (1996); Freer, *supra* note 64, at 1656.

<sup>179</sup> Cf. John A. Lynch, Jr., *Federal Procedure and Erie: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 321-26 (2008) (advocating for federal courts to use comparative impairment analysis when conducting a vertical choice-of-law analysis).

<sup>180</sup> See Freer, *supra* note 64, at 1648-49.

<sup>181</sup> See Rendleman, *supra* note 1, at 1122, 1158-59, 1165 (referring to appeal bond reform statutes as procedural); see also *Bass v. First Pac. Networks, Inc.*, 219 F.3d 1052, 1055 (9th Cir. 2000) ("Rule 62(d) is a purely procedural mechanism . . .").

<sup>182</sup> See, e.g., *Gasperini*, 518 U.S. at 429 (finding that while the New York state statute "contain[ed] a procedural instruction, . . . the State's objective [wa]s manifestly substantive" (citation omitted)); *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995) (explaining that some state rules, "though undeniably 'procedural' in the ordinary sense of the term," must be treated as substantive by federal courts when "the state's intention to influence substantive outcomes is manifest").

the courtroom by leveling the playing field for settlement negotiations—a quintessentially substantive goal.<sup>183</sup> A statute’s effect of altering the settlement landscape after a judgment, but before an appeal, can be analogized to state statutes capping the amount of damages for a given cause of action. Since there is agreement in the statutory damages cap context that “*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court,”<sup>184</sup> it is plausible to make the policy argument that courts should treat appeal bond statutes similarly.

Enforcing appeal bond reform statutes in federal court would ensure that defendants maintain the rights that states bestowed on them by statute. *Byrd* cautions that even if applying state law would further important state goals, federal law should nonetheless apply if the integrity of the federal judicial system is at stake. However, unlike in *Byrd*, where the balance of power between judge and jury was in question, there is no similar issue affecting the integrity of the federal judicial system in the context of Rule 62(d) and appeal bond reform statutes. Therefore, under a *Byrd*-style analysis, not only is there a risk of vertical forum shopping, but federal courts also have the ability to further state interests without damaging the integrity of the federal judicial system. Under such a scenario, federal courts should apply state statutes capping appeal bonds when applying current federal practice would be outcome-determinative.<sup>185</sup>

### CONCLUSION

The federal courts need to preserve a uniformity of process throughout the federal court system. Requiring a defendant to obtain a postjudgment stay according to different processes in different districts would present a

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<sup>183</sup> See Meeting Minutes, *supra* note 56 (statements of Sen. Al Melvin and Marcus Osborn, Manager of Government and Public Affairs, Arizona Manufacturers Council and Arizona Chamber of Commerce) (supporting the addition of appeal bond caps for substantive as well as procedural reasons); *cf. S.A. Healy Co.*, 60 F.3d at 311 (arguing that settlement practice, much like damages, can be classified as “substantive” when vertical forum shopping is taken into consideration); *Jones v. Krauthaim*, 208 F. Supp. 2d 1173, 1175, 1180 (D. Colo. 2002) (applying a Colorado state law concerning pleading requirements for punitive damages because one of the law’s purposes was to reduce the number of preemptive settlements).

<sup>184</sup> *Gasparini*, 518 U.S. at 431.

<sup>185</sup> Professor Burbank suggests that the *Byrd* balancing test does not balance state and federal interests, but rather balances the federal interest in following federal procedural practice with the federal interest in vertical uniformity between state and federal courts. Burbank, *supra* note 118, at 1949 & n.162. Even if Professor Burbank is correct, courts should still apply state statutes capping appeal bonds. The statutes do not affect federal procedural practice, as they do not alter any procedure. Further, the federal courts have an interest in not becoming the “go-to” forum for every lawsuit with a potentially massive jury award.

significant threat to the integrity of the federal judicial system. Further, stripping a federal judge of discretion to grant a postjudgment stay, when the Federal Rules explicitly give discretion to the judge, is not appropriate. State statutes capping appeal bonds produce neither of these consequences. Rather, they complement existing judicial practice in the federal courts by lowering supersedeas bond amounts—provided the judgment creditor is still secured in some degree—where obtaining a bond in the full amount of a massive judgment is either unwise, impracticable, or unfair to the defendant. Adhering to statutes capping appeal bonds would therefore not significantly alter the current practice of federal judges; it would merely allow certain defendants to appeal in federal court adverse judgments that they already would have had the opportunity to appeal in state court.